Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 75-894

October Term, 1975

JOSEPH NATALE,

Petitioner,

-against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RONALD M. KLEINBERG
Counsel for Petitioner
575 Lexington Avenue
New York, N.Y. 10022

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel. (212) 447-5358

TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Questions Presented 2

Reasons for Granting the Writ 9

1. The Court of Appeals has Improperly Read 18 U.S.C. 894 by Deleting an Essential Element of the Proof Needed for Conviction Under this Statute. The Court of Appeals Eliminated the Need for the Government to Prove that the Complainant was Placed in Fear of Harm by the Defendant's Actions. This Interpretation of the Statute is in Conflict with Other Circuits Which Require Proof of the Victims' State of Mind as an Essential Element of the Crime. This Question is one of First Impression in this Court and should be Resolved so that a Potential Defendant will have fair Warning of the Nature of the Acts Required for a Conviction under 18 U.S.C. 894 ... 9

2. The Circuit Court of Appeals Limited the Scope of the Brady Doctrine 373 U.S. 83 by Refusing to Require that the Government Produce the Grand Jury Testimony of a Defense Witness prior to his being Called to Testify on behalf of the Defendant. That Court Failed to Consider that such Denial also Deprived the Defendant of his Sixth Amendment Right to Effective Counsel at Trial ... 12

3. This Court has Ruled in the Case of *In Re Winship* 397 U.S. 358, that the Due Process Clause Protects the Accused Against Convictions Except upon Proof beyond a Reasonable Doubt of Every fact Necessary to Constitute the Crime with which he is Charged. The "Winship Rule" was Violated in this Case, as well as the Defendant's Right to have a Jury Trial when the Trial Court instructed the Jury that two of the Three Elements of the Crime were Undisputed. 17

Conclusion 19

Appendix A—Decision and Opinion of the United States Court of Appeals for the Second Circuit 23

Appendix B—United States Constitution 43

TABLE OF CASES

Page

Brady v. Maryland, 397 U.S. 742 (1970) 13

Christofil v. United States, 338 U.S. 84 (1949) 18

Gill v. United States, 285 F.2d 711 (5th Cir 1961) 15

Horning v. District of Columbia, 254 U.S. 135 (1920) 18

In Re Winship, 397 U.S. 358 (1970) 19

Jackson v. United States, 250 F.2d 897 (5th Cir. 1958) 15

Levin v. Katsenbach, 363 F.2d 287 (D.C. Cir. 1966) 16

United States v. Adams, 385 F.2d 548 (2nd Cir. 1967) 15

United States v. Alsop, 479 F.2d 65 (9th Cir. 1973) 9

United States v. Biondo, 483 F.2d 635 (8th Cir. 1973) 10

United States v. Brown, 412 F.2d 381 (8th Cir. 1969) 9

United States v. Curcio, 310 F.Supp. 351 (D.Conn. 1970) .. 10

United States v. DeCarlo, 458 F.2d 358 (3rd Cir. 1973) 10

United States v. Epps, 438 F.2d 1192 (4th Cir. 1971) 9

United States v. Nakoladski, 481 F.2d 289 (5th Cir. 1973) .. 10

United States v. Nixon, 417 U.S. 790 (1974) 16

United States v. Tourine, 428 F.2d 865 (2nd 1970) 18

United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967) .. 15

Wardius v. Oregon, 412 U.S. 470 (1973) 13

Williams v. Florida, 399 U.S. 78 (1970) 16

IN THE

Supreme Court of the United States

October Term, 1975

No.

JOSEPH NATALE,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Natale, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit entered on November 28, 1975, which affirmed a judgment of the United States District Court for the Southern District of New York, entered on a Jury verdict convicting Petitioner on various counts under the indictment herein.

Opinion Below

The opinion of the Court of Appeals is not yet reported, but is printed in Appendix A to this Petition. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on November 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

1. The Fifth and Sixth Amendments to the United States Constitution.

2. 18 U.S.C. 891; and 18 U.S.C. 894.

Questions Presented

(1) Whether the Court of Appeals was correct in its interpretation of 18 U.S.C. 894 (Collection of Extentions of Credit by Extortionate Means) by not requiring the Trial Court to charge the Jury that it is an essential element of that crime for the Government to prove that the victim was actually placed in fear of harm by the defendant.

(2) Whether the refusal of the Trial Court to grant the Defendant's request for the production of the Grand Jury testimony of its only witness was a violation of both Due Process of Law under the standards of Procedural Fairness and under the Brady Doctrine and also a denial of the Defendant's Sixth Amendment right to have effective representation at trial.

(3) Whether the defendant was denied Due Process of Law and his right to a Jury Trial when the Trial Court instructed the Jury that two of the three essential elements of the crime were undisputed.

1. Introduction

The Defendant Natale, along with co-defendants Frank Russo and John Conti, were tried under a three count indictment which

charged them with a conspiracy to collect extentions of credit by extortionate means, with the substantive crime of using such means to collect such extentions, 18 U.S.C. 2 and 894, and with an attempt to obstruct commerce by extortion, in violation of 18 U.S.C. 1951. The Jury found Natale and Russo guilty on the extortionate collection counts, but not guilty on the obstructing commerce count. Defendant Conti was acquitted on all counts. The Defendants Natale and Russo were sentenced to concurrent terms of five years imprisonment on each guilty count.

2. Statement of the Case

The Government's proof at trial was based upon testimony of Peter Amato, a neighbor of the defendant Frank Russo.

In reviewing his background, Amato indicated that he was employed with the Federal Credit Union in 1973 for a period of seven months and was soon discharged from that firm because of his acts of embezzlement. He received a six month suspended sentence for that crime. Thereafter, he was employed by the firm of Barbara Creations, a manufacturer of bridal veils, as a bookkeeper. Amato also embezzled funds from Barbara Creations, admitting that he stole more than $12,000 from that firm before the President of Barbara Creations, Murray Weiss, uncovered his scheme on February 8, 1975.

Amato attempted to borrow money from the Defendant Russo for alleged investment purposes in March of 1974. Russo introduced Amato to Natale for this purpose. Amato testified that they (Russo and Natale) gave him $2,000.00 (R127) and then they (Russo and Natale) told him that it would cost him $75.00 a week, and that this payment was nothing against the loan. He was told that the $2,000.00 could be paid back at any time.

In April of 1974, Amato again contacted Russo for another loan of $500.00. He indicated that the loan was given by Russo, and was repaid in ten weeks in the amount of $950.00.

In September of 1974, Amato again approached Russo and

told him that the Barbara Creations company was having cash flow problems and that if he would be able to loan that company money, he would be able to solidify his position at Barbara Creations. (R137).

Pursuant to this request, in November, Amato had a meeting with Natale, Russo and one Peter Lapin, the accountant and attorney for Natale. During that meeting, there were discussions pertaining to the financial conditions of Barbara Creations.

On December 3rd, Amato met Natale and Russo at Russo's office and was given $10,000.00. Amato indicated that he was told to repay this loan by payments of $300.00 a week. (R 139). Amato then indicated that Natale was called out of the room and Russo told him that it would be a good idea to leave a "token" for the favor, since no collateral was being asked for to secure the loan. He then gave Russo $3,000.00 and Russo told him not to mention the $3,000.00 "token" to Natale. Amato, thereafter, deposited the $7,000.00 into the Barbara Creations account (R140).

On January 22 or 23rd of 1975, Amato called Russo and told him that the Company was overdrawn at the Bank and that he needed more money. He was given $3,000.00 by Natale and Russo. He indicated that he was told to repay this loan back four for three and that the sum of $4,000.00 was to be returned in three weeks.

At this point in the testimony, Amato first mentions the transaction which was the basis for the instant indictment and conviction. On January 31, 1975, he contacted Russo and told him that the Company was again overdrawn at the Bank. He testified that he was given $5,000.00 and was told by the defendants that he would have to repay the sum of $6,500.00 in one week.

On February 5th, he contacted Russo and told him that he needed additional time to make the payments and Russo told him that he would be given until that Friday. On Friday, he called Russo and told him that he didn't have the money and

didn't know when he could have it. On February 10th, he told Russo that he was trying to get the money but he wasn't having any luck. In the morning of February 11th while he was leaving for work, he met Russo and they traveled to work together in Amato's car. During that car ride, Amato indicated to Russo that he didn't have the money and Russo replied, "Pete you better stop jerking around. You have got to come up with the money by 10:00 o'clock because after a while Joey will just waste you and not worry about the money at all". After this conversation, Amato decided to report this threat to the police.[1]

Pursuant to police instructions, Amato went to see Natale and Russo with a Detective Losito and introduced Losito to Natale and Russo as a friend by the name of Frank Lucas, who had been trying to help him raise the money.[2]

Losito told Natale and Russo that he (Amato) was scared and that he was with him all day. Losito also said that he had dealings with Shylocks before and that he (Amato) was trying to get the money. Natale then replied, according to Amato, "that you and ten guys like your friend or Jesus Christ off the cross couldn't help you if you keep giving me this kind of story about not paying me back. Then the money won't matter. I will kill you" (this conversation is not recorded) (R168).

The next day, Amato called Frank Russo from Barbara Creations and told Russo that Murray Weiss couldn't get the money, that he had been trying to raise it but that he did not have it at that time. Russo asked him how much money Murray's car was worth. He replied $15,500.00 and Russo said "all-right I

---

1. It was the contention of defense counsel during the trial that the reason Amato decided to go to the police was to prevent his own arrest for embezzlement from Barbara Creations and not because of the alleged fear generated in him by the defendants.

2. Amato was equipped by the Police with recording devices to record his conversation with Natale and Russo.

will call you" and then ended the conversation (R170).

He spoke again with Russo later that day and, according to Amato, Russo inquired if he had obtained the mone, and when Amato replied in the negative, Russo said, "Well, you just tell him. Muttel, if he doesn't come up with the money he loses his car and you lost your house". Amato indicated that previously he had given Russo a deed to his house and some gold coins as security before he received the $10,000.00 loan (R172).

On February 13th, Amato went to Russo's office and explained to Natale and Russo that he didn't have the money. Natale assured him that there was nothing to worry about and handed him a yellow sheet of paper. The paper asked for certain information pertaining to the financial condition of the company. On February 14th, Amato again called Russo and told him that he didn't have any money and didn't know when he would have it. Russo ended the phone conversation without giving any answer.

Amato later called back and told Russo that Murray (Weiss) had returned and had $3,000.00 and the stuff Russo requested (referring to the financial information of the corporation . . . (R176).

Thereafter, Amato went to Russo's office and saw Russo, Natale and the third defendant John Conti. Amato then gave Russo $3,000.00, which in turn was given to Natale who gave it to Conti. He also gave Natale the financial information which he previously requested. Natale indicated that he would give this information to Peter (Lapin) and he would know what to do with it (R180).

That night Russo informed Amato that Conti was a "hit man . . . there to size you up in case Amato hadn't paid."

February 16th was the christening of Amato's youngest child and Russo came to Amato's house to congratulate him and spend time with the family (R191). Later in the evening, in Amato's basement, Russo told Amato that he must have the balance of the money by the 18th because the 17th was a holiday.

On the 17th of February, Amato phoned Russo and told him that Weiss would like to meet him and discuss some arrangements concerning how the money was going to be paid back.

Later that day, Natale and Russo arrived at Barbara Creations where they met Amato, Weiss and Officer Poltorak, who was posing as Leon Hauser, Weiss' partner (R194). At that meeting, Natale wanted to know what arrangements were going to be made to pay back the balance of the money. Weiss replied that "We can make some sort of commitment". According to Amato's testimony, Natale then indicated that he would be willing to lower the "vig" by $500.00 and have the rest of the money paid back in two months. (A reading of the transcript of this conversation gives a completely different version; whereupon the mention of "vig" is brought up by Weiss and most of the conversation of Natale pertains to the past conduct of Amato and the arrangement that could be made for the payment or renegotiation of the loan.)

Amato further testified that he called Russo that night and explained to him that Weiss thought it over and decided not to pay Russo any money.

Amato then indicated that another meeting was arranged at Barbara Creations. At this meeting, Russo was there with Peter Lapin; also present were Murray Weiss, Officer Poltorak posing as Leon Hauser, and Amato. According to Amato, Lapin did most of the talking and inquired of Weiss if he, Weiss, owed Amato any money and whether in fact Amato had an interest in the business. Weiss replied that not only didn't he have an interest in the business but that Amato was stealing from the business, and that he was not responsible for this debt and that he would not pay it (R199). (The transcript of this conversation indicated that Weiss did most of the talking and after Weiss told Lapin about Amato's conduct, Lapin told Weiss he agreed Weiss didn't owe this money.)

Amato testified that during the evening of the 19th of

February, Russo visited him at his house and told him that he (Amato) had lied and that he was now in trouble and to put him "in their good eyes is going to cost $5,000.00 extra for lying to them and stringing them along". According to Amato, Russo then said if he didn't come up with this money that Joey will come into his house and do a job on his wife and children while he watched (R202) (this purported conversation was not recorded).

Even though these purported threats were made, Amato continued to fraternize with Russo and would drive to work with him at least three days a week. In fact, on February 16th, Russo was invited and did in fact attend Amato's son's christening. On that date, he borrowed $100.00 from Russo for the expenses of his son's christening. Amato also revealed that he helped Russo in the preparation of his tax returns and that Russo installed electrical outlets in his house and helped him panel his basement without charging him for these services.

Amato testified that he was never physically harmed in any way by any of the defendants (R228). He also indicated that at the time he received this money he never had the intention of paying it back (R203).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS IMPROPERLY READ 18 U.S.C. 894 BY DELETING AN ESSENTIAL ELEMENT OF THE PROOF NEEDED FOR CONVICTION UNDER THIS STATUTE. THE COURT OF APPEALS ELIMINATED THE NEED FOR THE GOVERNMENT TO PROVE THAT THE COMPLAINANT WAS PLACED IN FEAR OF HARM BY THE DEFENDANT'S ACTIONS. THIS INTERPRETATION OF THE STATUTE IS IN CONFLICT WITH OTHER CIRCUITS WHICH REQUIRE PROOF OF THE VICTIMS' STATE OF MIND AS AN ESSENTIAL ELEMENT OF THIS CRIME. THIS QUESTION IS ONE OF FIRST IMPRESSION IN THIS COURT AND SHOULD BE RESOLVED SO THAT A POTENTIAL DEFENDANT WILL HAVE FAIR WARNING OF THE NATURE OF THE ACTS REQUIRED FOR A CONVICTION UNDER 18 U.S.C. 894.

The Circuit Court found that the failure of the Trial Court to charge that the victim's state of mind was an essential element of the crime of "Collection of extensions of Credit by extortionate means" 18 U.S.C. 894, was not error. This finding was based on the conclusion that the statute deals only with threats of the defendant which would reasonably induce fear in an ordinary person. The Circuit Court held that it is the threat of harm which is prohibited and that actual fear is not an element of the offense.

In support of this conclusion, three Circuit Court opinions are cited, *United States v. Alsop*, 479 F.2d 65 (9th Cir 1973); *United States v. Epps*, 438 F.2d 1192 (4th Cir 1971); *United States v. Brown*, 412 F.2d 381 (8th Cir 1969). Interestingly enough, all three cases do not concern themselves with the statute in question, but rather speak to bank robbery convictions. The

cited cases indicate that actual fear need not be proven. It is submitted that the bank robbery statutes concern themselves with "actual taking" and do not relate to the intimidations needed to convict in contrast with 18 U.S.C. 894. In the bank robbery statutes, the criminal conduct complained of arises from the willful conduct of the accused and the fear in the victim is minimized. However, in enacting Chapter 42 "Extortionate Credit Transactions", Congress incorporated well established principles of Federal decisional law concerning extortion into the Act. Thus, the victim's state of mind is an essential element of the crime. *United States v. Biondo,* 483 F.2d 635, 643 (8th Cir. 1973). *United States v. Nakoldaski,* 481 F.2d 289 (5th Cir. 1973). *United States v. Curcio,* 310 F. Supp 351 (D Conn. 1970).

In construing Sec. 18 U.S.C. 894, one must first examine the definition of the above chapter as expressed in Section 891. Both sub-divisions (6) and (7) of this section, reflect the intent of the Congress to incorporate the accepted principles of extortion, where the conduct both of the defendant and the complainant are necessary ingredients of the crime.

Under these definitions, it was necessary for the Government to prove and the Court to charge that the borrower, Amato, understood the possibility that harmful consequences would be attendant upon default in his loan payments. Hence, it was necessary for the Government to prove that the borrower had such an understanding in that the victim's state of mind is an essential element of the crime. *United States v. Biondo, supra.*

The narrow construction of this statute by the Circuit Court also fails to take into account decisions of other Circuits which spoke to this very issue. For example, in *United States v. DeCarlo,* 458 F.2d 358 (3rd Cir. 1973), that Court was called upon to determine whether a certain letter written by the deceased, the debtor, was admissible in evidence against the defendant as a proper exception to the hearsay rule. The Court admitted the letter and justified such admission to prove the victim's state of mind. The Court stated "the victim's state of

mind, even subsequent to the initial threat is relevant in determining whether Saperstein (the debtor) was in a state of fear regarding collection of the debt. In footnote 12 of that opinion, it states:

> "It appears that the state of mind of the victim is not only relevant to the crimes charged in the indictment, but is an essential element to be proved by the Government."

That opinion also indicates that Section 894(b) makes it clear that the relevance of the victim's state of mind is an important element of that crime. Also see *United States v. Biondo, supra.*

The Defendant's defense relied on the fact that Amato was never placed in fear, but rather he used the defendant as a vehicle to prevent his own arrest by creating an "illusion of fear". Therefore, the failure of the Trial Court to properly place this important issue and element of the crime before the Jury deprived the defendant of a fair trial.

It is urged that since a basic principle of our criminal law is that the Government only prosecute people for crimes under statutes which fairly and clearly define conduct made criminal, this Court should review and determine whether under 18 U.S.C. 894 the victim's state of mind is an essential element of the crime.

2. THE CIRCUIT COURT OF APPEALS LIMITED THE SCOPE OF THE BRADY DOCTRINE 373 U.S. 83 BY REFUSING TO REQUIRE THAT THE GOVERNMENT PRODUCE THE GRAND JURY TESTIMONY OF A DEFENSE WITNESS PRIOR TO HIS BEING CALLED TO TESTIFY ON BEHALF OF THE DEFENDANT. THAT COURT FAILED TO CONSIDER THAT SUCH DENIAL ALSO DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL AT TRIAL.

During the second day of this trial, defense counsel requested from the Court that it be furnished with the Grand Jury testimony of Lapin in preparation for his testimony as a defense witness. Lapin had previously testified as a Government witness before the Grand Jury under a grant of immunity.

The Assistant United States Attorney refused to comply with this request and indicated that his only obligation would be to turn over Grand Jury testimony of prosecution witnesses.[3] Thereafter, the Court ruled that it would deny defense counsel's request, stating "that there is no basis for it whatsoever".

The Circuit Court of Appeals refused to adhere to the Brady Doctrine by holding there was no "suppression" in this case since Lapin was available by subpoena power and appeared and testified without subpoena, therefore, he was a cooperative witness and hence there was no information in the possession of the Government which the defendant would benefit from knowing. This holding fails to recognize that although Lapin testified without subpoena, he was not necessarily a cooperative witness and that in fact part of his testimony was more damaging than beneficial to the defendant. Lapin, when cross-examined by the Court and the Prosecutor, testified about usurious loan

3. Prosecutor was probably relying upon 18 U.S.C. 3500 as the basis for this statement.

transactions of the defendant which might have been refuted by his testimony in the Grand Jury.[4]

In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to relevant facts. As was stated in *Wardius v. Oregon,* 412 U.S. 470, (1973) "exceptions to this are justifiable only by the clearest and most compelling considerations". It is respectfully submitted that there was no justifiable reason for the Government to withhold Lapin's Grand Jury testimony. Yet, the disclosure of this favorable evidence should have been mandated under the Brady Doctrine. Also under our adversary system of trial, counsel must be given every opportunity to present an effective defense, by both being able to sustain and rehabilitate his own witnesses. For the Court to curtail this absolute right, was to deny the defendant's Sixth Amendment right to have effective representation at trial.

The Supreme Court, in *Brady v. Maryland,* 397 U.S. 742 (1970), hoped to put an end to the specter of prosecutorial suppression. The Brady decision stated:

> "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In Brady, the Court did not hesitate to indicate that surface justice should not be tolerated:

> "Society wins not only when the guilty are convicted but when criminal trials are fair, our system of the administration of justice suffers when any accused is tried unfairly."

4. Since Counsel was never shown Lapin's Grand Jury Testimony, we can not be as confident as the Court of Appeals in declaring that such information would be of no benefit to the Defendant.

Justice Marshall in his concurring opinion in *Moore v. Illinois*, 408 U.S. 786, (1971) stated:

> "The prosecutor knew that evidence existed that might help the defense, that the defense had asked to see it and that it was never disclosed *** It would be inconceivable to permit a prosecutor to adduce evidence demonstrating guilt without also requiring that he bear the responsibility of producing all known evidence tending to show innocence."

Thus, any favorable evidence bearing upon the guilt or innocence of the accused should be provided to defense counsel upon request. This should have included Lapin's Grand Jury testimony.[5] Assuredly, his testimony *tended* to be favorable and in order to properly prepare him as a witness, counsel should have had access to this favorable Grand Jury testimony. Even if counsel had the opportunity of preparing this witness before trial, it is conceivable the important matters revealed in the Grand Jury would have been forgotten by Lapin.

Also, as was evident from his testimony, there is a strong possibility that this witness did not want to fully cooperate with defense counsel in preparation for trial. It must be remembered that this witness could have been indicted as a co-conspirator and, in fact, testified under immunity in the Grand Jury. Conceivably he even violated the defendant's attorney-client privilege when he testified in the Grand Jury. He also conferred with the prosecutor before he testified at trial. Because of these factors, he would possibly be reluctant to confer as freely with defense counsel. As a consequence, counsel should have been allowed to examine the Grand Jury minutes to determine for himself if there was any favorable information in those minutes which could be utilized during the trial. If a reasonable doubt can be created in a jurors mind by the smallest piece of evidence

5. "After an indictment has been founded and the accused apprehended, the veil of secrecy surrounding Grand Jury proceedings may be safely lifted when justice so required" United States v. Alper, 156 F.2d 206 (2nd Cir. 1966).

or by a single word found in that Grand Jury testimony, it would have been sufficient reason to dictate disclosure. Hence, when guilt or innocence weighs in the balance, the Court and the prosecutor should not hesitate to disclose this testimony.

Also in presenting his defense, counsel should have been provided with this testimony for the purpose of rehabilitating the witness. This is certainly true in this case where this witness had to withstand vigorous cross-examination of not only the prosecutor but also the court.

The prosecutor utilized Lapin's Grand Jury testimony in his effort to cast suspicion and doubt upon the witness' veracity. Certainly equal access to these minutes should have been provided to defense counsel for the purpose of rehabilitating this witness in the eyes of the Jury. Yet, without these minutes, counsel did not have any basis to even lay a foundation for purposes of rehabilitation. *United States v. Youngblood*, 379 F.2d 365 (2nd Cir. 1967).

These minutes also should have been provided so as to enable counsel to properly prepare for his direct examination. For these minutes could have been used for the purpose of refreshing the witness' recollection, and also could have conceivably been admitted into evidence under the rule of past recollection recorded. *Gill v. United States*, 285 F.2d 711 (5th Cir. 1961); *Jackson v. United States*, 250 F.2d 897 (5th Cir. 1958); *United States v. Adams*, 385 F.2d 548 (2nd Cir. 1967). Here, it is obvious that the defense was at the mercy of his adversary, the prosecutor, who was waiting in the wings armed with this Grand Jury testimony, waiting to attack upon any showing of inconsistencies. Yet, without this Grand Jury testimony, defense counsel did not have the same advantage. In fact, counsel would have been precluded from asking pertinent questions of this witness without his first knowing how the witness testified in the Grand Jury.

Thus, the Court's denial of the defendant's request was a clear denial of procedural due process. It was clearly stated in

Wardius v. Oregon, supra:

> *"The ends of justice will best be served by a system of liberal discovery which gives both parties the maximum amount of information* with which to prepare their cases and thereby reduces the possibility of surprises at trial.
>
> * * *
>
> "We find ample room in that system as far as due process is concerned for a rule which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."

Also, this Court recently observed in *United States v. Nixon,* 417 U.S. 790 (1974):

> "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

In conclusion, this Court should reaffirm the saluatory proposition that a criminal trial is not a game of wits between opposing counsel, the one with the greatest resources to be the winner. *Levin v. Katsenbach,* 363 F.2d 287 (D.C. Cir. 1966). For the adversary system of trial "is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right to *conceal* these cards until played". *Williams v. Florida,* 399 U.S. 78, (1970). Therefore it is respectfully urged that this Court rule that under the circumstances of this case, it was a violation of law under both the 5th and 6th Amendments of the United States Constitution, for the District Court to deprive counsel from reviewing the Grand Jury testimony of its only witness, before such witness was called to testify on behalf of the defendant.

3. THIS COURT HAS RULED IN THE CASE OF *IN RE WINSHIP* 397 U.S. 358, THAT THE DUE PROCESS CLAUSE PROTECTS THE ACCUSED AGAINST CONVICTIONS EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED. THE "WINSHIP RULE" WAS VIOLATED IN THIS CASE, AS WELL AS THE DEFENDANT'S RIGHT TO HAVE A JURY TRIAL WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT TWO OF THE THREE ELEMENTS OF THE CRIME WERE UNDISPUTED.

The Trial Court indicated to the Jury that in order to find the defendants guilty of the crime of collection of extensions of credit by extortionate means, the Government would have to prove the following three elements by proof beyond a reasonable doubt:

1. That from or about January, 1975 until March 18, 1975, Weiss or Amato still owed principal or interest or renewals of loans which had been made to them.

2. That the defendant actually collected or attempted to collect all or part of the principal or interest still owed on the loans by Weiss or Amato.

3. That the defendant knowingly and intentionally used or participated in any way in the use of any extortionate means to collect or attempt to collect the loans or to punish Weiss or Amato for non-payment of the loans. (R591)

The Court then indicated that there appeared to be no dispute in respect to the first two elements of the crime and that only the third element of the crime was in sharp dispute. This comment by the Court invaded the sacred province of the Jury to be the sole and independent arbiters of the facts and denied the defendant due process as well as his constitutional right to a Jury trial (9 Wigmore Evidence #2549, Richardson Evidence [10th Ed #114], Thayer, Preliminary Treatise on Evidence pp. 183-262.)

Once the defendant pleaded not guilty to the crimes charged, the burden is upon the Government to prove *each* and *every* element of the crime beyond a reasonable doubt. The Court cannot lessen the burden no matter how conclusive it feels that the evidence was demonstrated by the Government. For even if it is assumed that all the evidence is wholly uncontradicted and that the inferences from the evidence all point in one direction, it would still be for the Jury to make that determination. If such were not the case, the Court in essence would be directing a partial verdict which is never allowed in a criminal trial. A.B.A. Minimum Standards, Trial by Jury (1968) 4.7(b) Comment.

The Circuit Court of Appeals determined that this comment by the Trial Judge was not in any sense unfair and that it fell far short of an actual direction that these facts had been proven beyond a reasonable doubt. The Appellate Court found comfort in this Court's opinion in *Horning v. District of Columbia,* 254 U.S. 135, 138 (1920) and by the fact that the Jurors were given the standard or pattern Jury instruction that the Jurors were the sole Judges of facts and not bound by the comments of the Judge.

Although this Court ruled in *Horning v. District of Columbia, supra.* that similar statements did not deprive the Defendant of a fair trial, that decision has been overruled subsilento by the In Re Winship decision. Also see *Christofil v. United States,* 338 U.S. 84 (1949). Additionally, the Horning case is distinguishable from the ordinary criminal case since there the offense of operating without a license did not require proof of criminal intent.[6]

It is an accepted principle of criminal law, that a charge which usurps the function of a Jury will not be saved from error by simply repeating in it from time to time that the Jury and not the Court is the finder of the facts. *United States v. Tourine,* 428 F.2d 865, (2d Cir. 1970).

---

6. The Horning decision has been criticized by Moore in his treatise on Federal Practice Vol. 8 No. 30.05. Also see the dissent in that opinion by Justice Brandeis.

It is respectfully urged that the compelling reasons set forth by this Court in the *In Re Winship* Decision should also prompt this Court to review this conviction. It is submitted that the Trial Court improperly invaded the sacred province of the Jury by its comment that two of the three elements of the crime were undisputed. This remark diminished the meaning and import of the *In Re Winship* Decision. Thus, it is contended that under the "In Re Winship" Rule, a Trial Judge should never instruct a Jury that elements of the crime are not in dispute when such facts have not been agreed upon or stipulated by the defense.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

RONALD M. KLEINBERG
Counsel for Petitioner
575 Lexington Avenue
New York, N.Y. 10022

Appendix

APPENDIX A
Decision and Opinion of the
United States Court of Appeals
for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 307-08—September Term, 1975
(Argued October 6, 1975 Decided November 28, 1975)
Docket Nos. 75-1276, 75-1298

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH NATALE AND FRANK RUSSO,

Appellants.

Before:

WATERMAN, OAKES and MESKILL,
Circuit Judges.

Appeal from judgments of conviction of conspiracy to use, and use of, extortionate means, to collect extensions of credit, 18 U.S.C. §§894 and 2, by the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, challenging instructions of and interrogation by court; prosecution's failure to produce grand jury testimony of, and examination of, chief defense witness; admissibility of notebook

seized at time of arrest; and admissibility of evidence of other crimes.

Affirmed.

RONALD J. KLEINBERG,
New York, N.Y.
for Appellant Natale

WILLIAM SONENSHINE, EVERSOFF & SONENSHINE, Brooklyn, N.Y., *for Appellant Russo.*

STEVEN K. FRANKEL, Special Attorney, United States Department of Justice (Paul J. Curran, United States Attorney for the Southern District of New York, John D. Gordan, III, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge*:

This criminal appeal involves a number of trial court rulings but no question of sufficiency of the evidence of applicability of the statute. Joseph Natale and Frank Russo appeal from judgments of conviction entered on May 15, 1975, after a jury trial in the Southern District of New York before Judge Lloyd F. MacMahon. They were tried, along with a codefendant, John Conti, under a three count indictment which charged them with a conspiracy to collect extensions of credit by extortionate means, with the substantive crime of using such means to collect such extensions, 18 U.S.C. §§2 and 894,[1] and with an attempt to

1. 18 U.S.C. §894(a) provides:

whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the non-repayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

obstruct commerce by extortion, in violation of 18 U.S.C. §1951.[2] The jury found appellants Natale and Russo guilty on the obstructing commerce count. Defendant Conti was acquitted on all counts. Judge MacMahon sentenced the appellants to concurrent terms of five years' imprisonment on each guilty count. We affirm.

The heart of the crime for which Natale and Russo have been convicted is the use, or threatened use, of force or violence to a person, his reputation or his property, as a means of collecting money lent. *See* 18 U.S.C. §891[7]. The transactions which come under the purview of this statute are normally usurious and, therefore, are unenforceable in courts of law.[3] It is the effort of usurious money lenders, or "loan sharks," to seek extra-legal methods of enforcing their unconscionable agreements which this statute is designed to restrain.[4] And it is just such efforts which have been proved at trial in this case.

The phrase "extortionate means" is defined to include "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. §891(7).

2. 18 U.S.C. §1951(a) provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

3. Usurious loans are illegal under New York law. N.Y. Penal Law §190.30 (McKinney 1975), and usurious contracts are unenforceable, N.Y. Gen. Obl. Law §5-511 (McKinney 1975).

4. The question of the constitutionality of this federal regulation of intrastate "loan-sharking" has been previously decided affirmatively by this court in *United States v. Manarite*, 434 F.2d 1069 (2d Cir. 1970), *cert. denied*, 402 U.S. 972 (1971), and in *United States v. Perez*, 426 F.2d 1073 (2d Cir. 1970), *aff'd*.

Frank Russo had a neighbor, Peter Amato, who, during 1974 and the first part of 1975, worked as the bookkeeper for Barbara Creations, Inc., a Manhattan manufacturer of bridal veils. Barbara Creations was having cash flow problems late in 1974 and Amato evidently proposed to its owner, Murray Weiss, that Amato loan a sum to the corporation to assist it in its financial straits. Weiss agreed to accept temporary loans from Amato of $7,000 on December 3, 1974, $3,000 on January 24, 1975, and $5,000 on January 31, 1975.

Apparently unbeknownst to Weiss, the source of these funds was not really Amato, but was Joseph Natale and Frank Russo. Amato had contacted his neighBor Russo, from whom he had previously borrowed at usurious rates, in November of 1974, and informed him that if Russo could loan him a substantial sum of money he would be able to use it to solidify his position at Barbara Creations. Apparently Amato led Russo to believe that Amato held an ownership interest in the company. Russo told Amato to meet with him and Frank Natale in Russo's office at 1430 Broadway in New York to discuss a possible loan. At their meeting, Amato provided Natale and Russo and their attorney, Harris Lapin, with information concerning Barbara Creations and its officers. On December 3, 1974, Russo and Natale gave Amato $10,000 in cash, with the understanding that a weekly payment of $300 interest ("vigorish") would be due until the principal was repaid in full. On the basis that no collateral had been provided to secure the loan, Russo asked Amato to leave $3,000 of the amount lent with him, as a "token" for the favor of the loan. Amato agreed and deposited the remaining $7,000 in the Barbara Creations bank account. Three hundred dollars per week on a net $7,000 loan approximate 222 per cent interest per annum, even without compounding.

---

402 U.S. 146 (1971). *Perez* was affirmed by the Supreme Court on the basis that Congress's finding that local loan-sharking has a substantially adverse effect on interstate commerce indicated that the legislation is rationally in furtherance of Congress's Article I authority over commerce.

On January 22, 1975, Amato again contacted Russo with a request to borrow funds for Barbara Creations. He told Russo that the corporation was overdrawn at the bank and needed money to cover the checks it was writing.[5] Russo agreed to loan Amato $3,000, with the understanding that repayment in the amount of $4,000 was to be made in three weeks. Amato repaid this loan a few weeks later with money provided by Barbara Creations' president, Weiss.

On January 31, 1975, the corporation's account again became overdrawn, and Amato, once again flirting with the loan sharks' jaws, sought a loan of $5,000 from appellants. He met with them in Russo's office that day. Amato was given the $5,000, but with instruction to pay back $6,500 no later than February 6, 1975. It was the failure to repay this loan, as well as delay in repayment of a portion of the December, 1974, advance, which led to the offense charged in this case.

When Amato began to fall behind on his payments, he was given a series of extensions which culminated in a deadline of 10:00 a.m. on February 11. On the morning of the 11th Russo met his neighbor Amato as he was leaving his home. He was friendly enough to tell Amato that he had better come up with the money by 10:00 a.m. or that Natale "will just waste you, and not worry about the money at all." Amato decided to report this threat to the police. An officer was assigned to the case, and the officer and Amato went to Russo's office in Manhattan. The officer posed as a friend of Amato's who was trying to help him raise money to repay the loan. While the officer was there, and in Russo's presence Natale told Amato that if he kept "giving me this kind of story about not paying me back . . . then the money won't matter. I will just kill you."

---

5. One factor contributing to Barbara Creations' chronic cash flow problems was the extraordinary fact, admitted by Amato, that he was padding the payroll and taking money out of the corporation's petty cash account. He extracted approximately $12,000 out of the firm before his activities were discovered by the president, Weiss, on February 8, 1975, at which time Amato was fired. Thus we have the rather bizarre spectacle of a fellow borrowing money at usurious rates to lend it to a corporation from which he was stealing.

The next day, Russo called Amato on the telephone at work and threatened to take Weiss' car and Amato's house if the loan wasn't repaid immediately. On the 14th, Amato had obtained $3,000 to repay part of his loan and took it to Russo's office. When he arrived Natale and John Conti were waiting along with Russo. Amato paid over the money which was handed by Russo and Natale to Conti. Later that day, Russo told his neighbor Amato that Conti was a "hit man . . . there to size you up" in case Amato hadn't paid.

The final chapter in this saga occurred on February 19, 1975. Russo and Natale went to the offices at Barbara Creations to meet with Weiss and Amato. At this meeting, Weiss informed the appellants that Amato had no ownership interest in Barbara Creations, that he had been stealing from the company, that Weiss was not responsible for any of Amato's debts and accordingly would not pay them anything. Apparently this was a surprise to Russo, for later that day he went to Amato's home and told him, "What's it going to be?—you lied and now you are in trouble and to put you in their good eyes is going to cost you $5,000 extra for lying to them, stringing them along all this time." Amato testified that "Russo said to me if I did not come up with this money that Joey will come into my house, do a job on my wife and children in front of me, while I watched."

For the above series of events, Russo and Natale were convicted of the use of extortionate means to collect extensions of credit. On this appeal they urge seven separate grounds for reversal of their conviction.

I. *Charge to the Jury on the Elements of the Offense.* The judge at trial instructed the jury that there are three separate elements of the §894 substantive offense charged in this case. The Government must prove (1) that there was principal or interest outstanding on the loans, (2) that the defendants actually collected or attempted to collect sums due, and (3) that the defendants employed extortionate means to collect same. Judge MacMahon stated that, as to the first two elements of the offense, "I don't think there is any dispute in the evidence . . . " Appellants claim that this charge amounted to a directed verdict on those two elements of the offense and that they are entitled, therefore, to a new trial.

Cases such as *United States v. Howard*, 506 F.2d 1131 (2d Cir. 1974), and *United States v. Fields*, 466 F.2d 119 (2d Cir. 1972), have reestablished that failure to charge each separate element of an offense may be plain error. Such "errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are." *United States v. Fields, supra*, 466 F.2d at 121. Failure to charge each element of the offense may be reversible error even where the elements not charged have been wholly uncontested by the defendant. *United States v. Howard, supra*, 506 F.2d at 1134. The plea of not guilty places every issue in doubt, and not even undisputed fact may be removed from the jury's consideration, either by direction or by omission in the charge. *See United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 408 (1947); *Roe v. United States*, 287 F.2d 435, 440 (5th Cir.), *cert. denied*, 368 U.S. 824 (1961). *But cf. United States v. Pravato*, 505 F.2d 703 (2d Cir. 1974) (court's inadvertent and erroneous statement that stipulation covered one element not plain error where all elements charged and no objection as matter of trial strategy).

In this case, however, the trial judge did charge each element of the offense. His indication that he did not "think" there was any dispute in the evidence as to the first two elements of the offense fell far short of an actual direction to the jury that these essential facts had been proven beyond a reasonable doubt. A trial judge is permitted to comment upon the evidence if he does so fairly and makes clear to the jury that all matters of fact are submitted for their determination. *See, e.g., Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.); *Gant v. United States*, 506 F.2d 518, 520 (8th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975); *United States v. Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). When

commenting on the evidence. Judge MacMahon gave the standard or pattern instructions that the jurors were the sole judges of facts and not bound by his opinions, informing the jury that it alone was to decide the weight, effect and value of the evidence and that the court had no opinions on the evidence.[6] *See Quercia v. United States*, 289 U.S. 466, 469 (1933); *United States v. DeLaMotte*, 434 F.2d 289, 292 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). The judge's expressed opinion as to the absence of dispute over the first two elements of the offense was not in any sense unfair. The evidence that a debt existed and that efforts at collection had been made was, in fact, not disputed by the defense.[7] Rather, their position at trial was that the financial transactions involved here were wholly amicable and legitimate.[8] Since the trial court's comment, in its context, was fair, and since the jury's role as finder of facts was repeatedly and accurately explained by the trial court, we find no error in the challenged instructions. *Cf. United States v. Pravato, supra.*

---

6. Additional statements to the same effect were made at least twice more in the judge's instructions to the jury.

7. It should be noted that Judge MacMahon did not charge that there was uncontradicted evidence on the elements of the offense which "as a matter of law" foreclosed jury deliberations on the issues. *See United States v. Gollin*, 166 F.2d 123, 125 (3d Cir.), *cert. denied*, 333 U.S. 875 (1948). Rather, the judge suggested that he did not "think" the evidence adduced by both parties was "in dispute" as to two of the elements. This is not tantamount to a direction that the evidence "not in dispute" proves the elements of the offense beyond a reasonable doubt.

8. Appellants argue that they had informed Weiss, after their meeting with him in his office on February 18, 1975, that he was not legally liable on the loans they had made Amato. They suggest in their briefs that the jury might have concluded that this was also their posture toward Amato. But it does not follow that because appellants felt Weiss was not obligated on Amato's debt, they also felt Amato owed them nothing. There is no evidence of a willingness to forgive the debt. In fact, the evidence of their belief that Amato remained indebted to them is not disputed in the trial record.

More troublesome is appellant Natale's contention that the trial court's charge to the jury was inadequate because it failed to require the jury to find that the threats employed by Russo and Natale had actually placed Weiss or Amato in fear of harm. The judge charged the jury that the Government must prove from the evidence that "an ordinary person would have been put in fear of immediate bodily harm or future bodily harm from anything that the defendant said or did to Weiss or Amato . . . . " It is true that this charge did not require the jury to find that the persons threatened had actually been placed in fear, but it is the threat of harm which is prohibited by 18 U.S.C. §894, and actual fear is not an element of the offense. *But see United States v. Biondo*, 483 F.2d 635, 643 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974) (since "victim's state of mind is an essential element of the crime charged," 18 U.S.C. §1951, hearsay evidence regarding state of mind admissible). To be convicted, the defendant must have intended to make a "threat of use, of violence or other criminal means, to cause harm to the person, reputation, or property of [another] person." 18 U.S.C. §891(7). Convictions have been sustained under this statute even where the person threatened has denied at trial that he was put in fear by the threat. *United States v. DeLutro*, 435 F.2d 255 (2d Cir. 1970), *cert. denied*, 402 U.S. 983 (1971). The approach chosen by the trial judge, to define the word "threat" in the statute by reference to the reasonable apprehensions of an "ordinary person," gives the statute a proper construction since it focuses the jury's attention on the evil being attacked—the defendant's conduct. Acts or statements constitute a threat under 18 U.S.C. §891(7) "if they instill fear in the person to whom they are directed *or are reasonably calculated to do so in light of the surrounding circumstances . . . . " United States v. Curcio*, 310 F. Supp. 351, 357 (D. Conn. 1970) (Timbers, J.) (emphasis added). It is this "calculated" use of threatening gestures or words to collect credit extensions which Congress has made criminal. Actual fear need not be generated, so long as the defendants intended to take actions which reasonably would

induce fear in an ordinary person.[9] In other words, it is the conduct of the defendant, not the victim's individual state of mind, to which the thrust of the statute is directed. We have no doubt that Congress meant to protect not only the weak and timid from extortionate threats, but the strong and intrepid as well. *See United States v. Alsop*, 479 F.2d 65, 67 (9th Cir. 1973); *United States v. Epps*, 438 F.2d 1192 (4th Cir. 1971). *See also United States v. Brown*, 412 F.2d 381, 384 (8th Cir. 1969). Accordingly, we reject the claim that actual fear is a necessary element of this offense.[10]

Charge to the Jury on Intent and Entrapment. Appellants argue that the portions of Judge MacMahon's charge to the jury which dealt with criminal intent and entrapment were prejudicial. The appellants' first claim is that the judge's comments on the matter of intent to threaten use of force were too one-sided and indicated a conviction on the judge's part that

---

9. We should also observe that the appellants failed to make timely objection to the instructions pursuant to Fed. R. Civ. P. 30. They cannot, therefore, object to any mistakes in the charge which are not "plain error." In light of our holding that the instructions given were proper, we need not consider this alternative ground for affirming the judgment. We should note, however, that at least once in the charge the judge instructed the jury that it must find that the threats did arouse or were intended to arouse fear in Amato or Weiss. *See* note 11 *infra*. Thus, any error in the charge was at least partially moderated in its total context.

10. Appellants' argument on this point under 18 U.S.C. §894 was somewhat confused. They cited to us the requirement that actual fear be shown to have existed in convictions under 18 U.S.C. §892 for "making extortionate extensions of credit." In prosecutions under that statute, unlike those under §894, the Government must show a prior "understanding of the creditor and debtor . . . that delay in making repayment . . . could result in the use of violence . . . to cause harm to the person, reputation, or property of any person." 18 U.S.C. §891(6). Since this understanding will exist only where the debtor fears that the threat of force is genuine, the state of mind of the victim would appear an essential element of that offense to be proved by the Government. *See United States v. DeCarlo*, 458 F.2d 358, 367 n. 12 (2d Cir.), *cert. denied*, 409 U.S. 843 (1972).

the appellants were guilty. While impartiality is, of course, required in the judge's summation, *Quercia v. United States*, *supra*, 289 U.S. at 470, he has discretion to choose which facts he will mention in his comments, so long as the overall thrust of the charge is fair to both sides. *E.g.*, *United States v. Tourine*, *supra*, 428 F.2d at 869. Judge MacMahon noted that the jury should consider, in determining whether a conspiracy to use extortionate means existed, "whether [the persons involved] kept the usual business records of checks, etc., or whether they dealt in large sums of cash and currency." But these are perfectly proper comments which do not, on their face, amount to the sort of repetitious, one-sided summary that unfairly prejudices the defendants and requires a new trial. This short comment on the evidence was given in the context of instructions which carefully protected the jury's independent right to evaluate the entire case, and we find that appellants were not prejudiced by it. *Compare United States v. Tramunti*, 513 F.2d 1087, 1119-20 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975), *with Boatright v. United States*, 105 F.2d 737, 739 (8th Cir. 1939).[11]

In the course of instructing the jury, the trial judge informed them that the defense of entrapment is not available where the defendants have the intention, readiness and willingness to commit the crime. The appellants claim that this was a gratuitous side reference which indicated the judge's belief in their guilt. In fact, however, a short explanation of that defense, and its applicability to this case, was made necessary by defense

---

11. The charge given by Judge MacMahon on the subject of the defendants' intent to use extortionate means was as follows:

> [T]he essential question for you is whether the defendant knowingly and intentionally aroused or instilled or attempted to arouse or instill a reasonable fear of bodily harm or economic loss in Weiss or Amato by creating a menacing atmosphere of intimidation and threats. It is not necessary for the victim to become terrified, panic stricken, hysterical or show the least sign of fright.

The appellants claim that the instruction is insufficient because actual fear must have been proven as part of this offense. In light of our discussion above, we cannot accept that view.

counsel's closing argument which had suggested that Amato had tried to "entrap" Russo and Natale to protect himself from embezzling charges. In this situation it was entirely appropriate for Judge MacMahon to have provided a brief explanation of the nature of the defense to assure that the jury was not sidetracked by matters wholly undeveloped in the record and a defense never really asserted.

III. *Trial Court's Intervention at Trial.* In several instances the trial judge intervened in the conduct of the trial to ask questions of various witnesses. We have time and again cautioned that the judge should be careful to preserve an attitude of impartiality and guard against communicating to the jury any impression that the court is of the opinion that the defendant is guilty. *E.g., United States v. Nazzaro,* 472 F.2d 302 (2d Cir. 1973). Our review of the record convinces us that Judge MacMahon was doing no more than asking such questions as would serve the ends of justice by assisting the jury in understanding the evidence. *United States v. Cuevas,* 510 F.2d 848, 850 (2d Cir. 1975); *United States v. Boatner,* 478 F.2d 737, 740 (2d Cir.), *cert. denied,* 414 U.S. 848 (1973); *United States v. Pellegrino,* 470 F.2d 1205, 1206-07 (2d Cir. 1972), *cert. denied,* 411 U.S. 918 (1973).

The complaint of excessive intervention by the trial judge is focused on the examination of Harris Lapin, the chief defense witness and attorney who assisted Russo and Natale at their February 19, 1975, meeting with Weiss and Amato.[12] Lapin was being cross-examined regarding Amato's ability to provide collateral for the loans, when the trial judge asked two questions about whether Lapin knew what the terms of the loans were to be. He also asked Lapin whether he knew that the loan arrangement was usurious,[13] and therefore that any collateral

12. In that meeting Lapin advised Russo and Natale that Weiss and Barbara Creations were not obliged to repay to the appellants any sums which Amato had borrowed, even though Amato had lent the money in turn to the corporation.

13. The transaction then being discussed was a loan of $5,000 with repayment of $6,500 one week later. Even without compounding of interest, this indicates an interest rate of over 1500 per cent per year. On redirect Lapin denied knowing the duration of the loan, but the amount of the interest apparently did not trouble him or raise any questions in his mind, and this is what the judge's questions concerned.

arrangement would be unenforceable. The appellants contend that this "hostile" line of questioning was intended to ridicule their witness and to discredit their defense that their relations with Amato were conducted as normal business transactions. It is obvious from the record, however, that the court's questions were intended to assist the jury in its evaluation of the nature of the transactions in this case. This limited interjection by the trial judge was well within his active responsibility to assure that the issues were clearly presented to the jury. *See United States v. Brandt,* 196 F.2d 653, 655 (2d Cir. 1952). A reading of the examination of witness Lapin *in toto* establishes that the claim of prejudice cannot be sustained; we therefore reject appellants' claim of error. *See United States v. Newman,* 481 F.2d 222, 224 (2d Cir. 1973) (per curiam).

IV. *Refusal to Produce Grand Jury Testimony of Witness Lapin.* Appellants claim that the trial court erred in refusing to require the Government to produce the grant jury testimony of the witness Lapin prior to his being called as a defense witness. The contention is that this constituted a suppression of exculpatory evidence in violation of the rule of *Brady v. Maryland,* 373 U.S. 83, 87 (1963) (suppression by prosecution of evidence favorable to accused upon request violates due process where evidence is material, irrespective of good or bad faith of prosecution). The gloss which appellants would have us read upon *Brady* is that the prosecution must provide evidence favorable to the defense which is given by a witness before the grand jury even though the witness is one who testifies at trial for the defense.[14] This we decline to do.

14. The appellants, of course, have no right to obtain Harris Lapin's grand jury testimony under the Jencks Act, since Lapin was not a "Government witness or prospective Government witness . . . ." 18 U.S.C. §3500(a). *See generally United States v. Dioguardi,* 428 F.2d 1033 (2d Cir.), *cert. denied,* 400 U.S. 825 (1970). Lapin was called as a witness by, and his testimony was favorable to, the defense.

"The heart of the holding in *Brady* is the prosecution's suppression of evidence" favorable to the accused. *Moore v. Illinois*, 408 U.S. 786, 794 (1972). The concept of "suppression" implies that the Government has information in its possession of which the defendant lacks knowledge and which the defendant would benefit from knowing. *See Giles v. Maryland*, 386 U.S. 66, 96 (1967) (White, J., concurring). Here, as in *United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973), this essential prerequisite to invocation of the *Brady* rule is lacking. There was no "suppression" involved in the Government's turning over Lapin's grand jury testimony to the trial court for his decision on the disclosure motion. Nor were the appellants lacking access to the information which they sought to obtain from the grand jury minutes. Lapin, who had represented both of them, was continually available for interviewing, or, had he proved suddenly uncooperative, for subpoena.[15] In fact, Lapin appears to have cooperated fully throughout the trial with them. They have failed to advance any plausible suggestion of prejudice to them from the jury's ruling, so that we conclude that there has been no suppression whatsoever of any favorable evidence in this case. *See United States v. Ruggiero, supra*, 472 F.2d at 604-05.

V. *Examination of Witness Lapin by the Prosecutor.* Appellants claim that the prosecutor improperly discredited the testimony of witness Lapin by asking, on cross-examination, whether Lapin recalled "testifying before a grand jury under immunity on the 13th of March of this year." This is said to have ineluctably led the jury to the conclusion that the witness's

15. If a subpoena had been necessary to secure the witness's testimony, and that testimony had surprisingly been unfavorable, the defense would have been entitled to examine and use the grand jury transcript to refresh the witness's recollection or to impeach his testimony. *See Dennis v. United States*, 384 U.S. 855, 868-70 (1966); *United States v. Youngblood*, 379 F.2d 365 (2d Cir. 1967). But here the witness appeared voluntarily and was cooperative with the defense at trial. On this basis, the appellants' claim that the grand jury minutes may have been useful for potential impeachment purposes is plainly frivolous.

credibility was suspect because grand jury testimony had to be forced out of him over a claim of Fifth Amendment privilege.

Where a prosecutor directly asks a defense witness at trial whether the witness refused to answer questions at the grand jury proceedings because the answers might have tended to incriminate him, courts have found prejudicial error and reversed the convictions. *See, e.g., United States v. Williams*, 464 F.2d 927 (8th Cir. 1972); *cf. United States v. Glasser*, 443 F.2d 994, 1005 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). Such direct efforts to impeach a defense witness are improper under *Grunewald v. United States*, 353 U.S. 391 (1957), where the Supreme Court reversed a conviction because the prosecutor had improperly cross-examined a defendant as to the assertion of his Fifth Amendment privilege before a grand jury. The salutary ruling of *Grunewald* was based on the view that the question prejudiced the credibility of the defendant without sufficiently bearing on the truth of the testimony he had given at trial. *Id.* at 423-24. Mr. Justice Black's concurrence in *Grunewald* took an even harsher stance toward such questioning: "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it." *Id.* at 425. This circuit has taken the view that *any* direct questioning as to whether a witness had previously invoked his constitutional right to refuse to testify at a grand jury proceeding constitutes trial error. However, the error may be harmless if (1) the witness's testimony were remote from the crime charged and (2) there were no likelihood of confusion in the jury's mind which would link the defendants to the witness's assertion of the privilege. *See United States v. Glasser, supra*, 443 F.2d at 1006; *United States v. Sing Kee*, 250 F.2d 236, 240-41 (2d Cir. 1957), *cert. denied*, 355 U.S. 954 (1958).

This case differs from *Grunewald* and its progeny, however, because here the reference to the constitutional privilege was neither direct nor clear. This incidental reference to immunity provided before the grand jury was not itself framed as a question, but rather was contained in the question being asked.

It was not flagged before the jury as it was in *Grunewald* and *Williams*. It was not even objected to at trial. The prosecutor's naughty words were in effect a flyspeck on this record, not a blot. Furthermore, it is postulating far too great a sophistication on the part of the jurors to conclude that, from the fact that immunity was provided to Lapin before the grand jury, they drew the inference that he had exercised his Fifth Amendment privilege to refuse to testify there. The fact that immunity is provided does not always imply that a Fifth Amendment refusal to testify has first occurred. For example, under the New York Criminal Procedure Law §190.40 (McKinney 1967) all witnesses are granted immunity automatically by reason of their appearance before the grand jury unless the immunity is specifically waived. It would be wholly speculative to attribute to these lay jurors an understanding of the reference to immunity *en passant* as anything more than a description of the grand jury procedure. Here, moreover, the trial judge after only three questions and answers read by the prosecutor from the grand jury testimony (bearing on Lapin's representation of appellants and acquaintance with Conti) struck the line of inquiry altogether. Accordingly, we find no error in this questioning and need not reach the issue whether any putative error was harmless under *United States v. Glasser, supra.*

VI. *Admission at Trial of a Notebook Seized at Arrest.* The Government introduced into evidence at trial a black notebook which had been seized at the arrest of the appellants. As the police entered russo's office to make the arrest, they found this notebook lying on the table in front of Russo. The notebook was in plain view, approximately a foot and a half from where appellant Natale was standing at the time of the arrest. The book was lying shut on the desk, but when opened it was seen to be filled with apparently incriminating records of usurious transactions, including the ones involved in this case.

There are two objections which have been raised to the admission of this evidence. The first is that the seizure of the notebook, though incident to the valid arrest of the appellants,

was in violation of the Fourth Amendment. The validity of such a search is to be determined under the criteria of *Chimel v. California*, 395 U.S. 752, 762-63 (1969), which restricts searches of the scene incident to arrest to the area that must be searched to ensure the protection of the officers and the preservation of easily disposable evidence. We are by no means convinced that the seizure of the notebook in this case was necessary either to protect the officers or to preserve the evidence from destruction. *See Coolidge v. New Hampshire*, 403 U.S. 443, 472 (1972). *But cf. United States v. Robinson*, 414 U.S. 218 (1973) (search of *person* incident to arrest valid even as to cigarette package; no need to protect evidence or arresting officer must be shown). We realize that some courts have chosen to water down the *Chimel* requirements, and have accepted justifications for searches incident to arrest which fall short of the "emergency" context in which this exception to the warrant requirement developed. *See United States v. Nevarez-Alcantar*, 495 F.2d 678, 682 (10th Cir.), *cert. denied*, 419 U.S. 878 (1974) (at arrest for disorderly conduct, search of locked suitcases valid); Note, *The United States Court of Appeals: 1973-1974 Term Criminal Law and Procedure*, 63 Geo. L.J. 331, 370 (1974). In this case, however, we need not determine the applicability of *Chimel* to the circumstances of this arrest. The reason is that the appellants have raised this claim that the notebook should be suppressed for Fourth Amendment violations for the first time at this appeal. *United States v. Mauro*, 507 F.2d 802, 805-807 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975) (failure to raise suppression claim prior to trial makes motion to suppress at trial untimely under Fed. R. Crim. P. 12(b) and 41(f)).

The appellants did validly raise at trial, and have therefore preserved for this appeal, a different objection to the admission of the notebook. The argued that there was nothing in the record to show that the notebook was the property of either Natale or Russo, and that absent authentication the document should be excluded. *See, e.g., McGowan v. Armour*, 248 F. 676 (8th Cir. 1918); 7 J. Wigmore, Evidence §2129 (3d ed. 1940); Mc-

Cormick's Handbook on the Law of Evidence §§218-26 (2d ed. 1972). The trial court's rejection of this argument was proper.

Proof of the connection of an exhibit to the defendants may be made by circumstantial, as well as direct, evidence. The prosecution need only prove a rational basis from which the jury may conclude that the exhibit did, in fact, belong to the appellants. *See United States v. Sutton*, 426 F.2d 1202, 1207 (D.C. Cir. 1969) (while "mere contents" are ordinarily insufficient evidence of genuineness, contents may be considered in conjunction with other circumstances); *United States v. Montalvo*, 271 F.2d 922, 925 (2d Cir. 1959), *cert. denied*, 361 U.S. 961 (1960). In the words of Rule 901(a) of the new Federal Rules of Evidence (not yet effective at the time of trial),

> [t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Among the facts which support the finding of authenticity here are the presence of Natale and Russo at the place where the notebook was discovered, the fact that the office in which the arrest occurred and the notebook was seized was the same one in which Amato had held numerous meetings with Russo and Natale, Russo's admission that the office was his, and an entry in the notebook which referred to the $5,000 loan for $6,500 made to Amato. *See United States v. Sutton, supra*, 426 F.2d at 1207-08; 7 J. Wigmore, *supra* ÷ ½/¼— (authentication by contents). These same facts also reveal the probative value of the exhibit as a record of the transactions testified to by Amato between Amato and the appellants.[16] Thus we hold that the document was sufficiently authenticated, was of significant probative value, and was therefore properly admitted into evidence by the trial court.

16. The entries in the notebook were, of course, evidence that an outstanding debt remained to be paid by Amato. The validity of this evidence was not disputed by the appellants, a fact which undercuts their argument in Part I of this opinion, *supra*. *See especially* text at notes 7-8 *supra*.

VII. *Use of "Other Crimes" Evidence and Instructions Thereon.* The appellants contend that it was improper to allow into evidence certain testimony and documentary proof which tended to show that Natale and Russo had been engaged in several usurious transactions both before and during the period of the conspiracy here charged. The appellants were not, of course, charged with usury at this trial. Therefore, evidence of their usurious transactions should not have been admitted if it were introduced *solely* to show that the defendants had criminal characters. *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). But if this proof of "other crimes" was used at trial for any valid purpose *other* than to show the appellants' criminal character, then it should have been admitted so long as its probative value outweighs its potential prejudice. *United States v. Torres*, 519 F.2d 723, 727 (2d Cir. 1975); *United States v. Papadakis, supra*. The Government contends that this evidence was admissible to show the "background and development" of the conspiracy to use extortionate means to collect credit extensions. *See United States v. Torres, supra; United States v. Colasurdo*, 453 F.2d 585, 591 & n.3 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). We agree that this evidence helps to establish that Natale and Russo had continuing debtor-creditor relations with Amato and others, relations of a type which could not be enforced legally,[17] and therefore might well have been grounded in extra-legal methods of enforcement. Thus we have no trouble in concluding that the evidence of usurious behavior was relevant to the proof of a conspiracy to employ extortionate means to collect on such loans. Admission of this evidence was well within the discretion of the trial court.

Appellants' final contention is that the failure of the trial court to give cautionary instructions to the jury as to the limited use of the "other crimes" evidence was reversible error. However, the appellants' counsel failed to request such a limiting instruction

17. *See* note 3 *supra*.

either at trial or at the close of the case in the charge to the jury. Failure to have asserted this claimed right below precludes review here. *See United States v. Papadakis, supra,* 510 F.2d at 295; *United States v. Bozza,* 365 F.2d 206, 214 (wd Cir. 1966).

Having considered and rejected all of the appellants' arguments, we affirm the judgment below.

Judgment affirmed.

APPENDIX B

United States Constitution

Fifth Amendment

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

UNITED STATES CODE 18 U.S.C. 891

CRIMES AND CRIMINAL PROCEDURE
CHAPTER 42. EXTORTIONATE CREDIT TRANSACTIONS

Sec. 891. Definitions and rules of construction.
892. Making extortionate extensions of credit.

893. Financing extortionate extensions of credit.
894. Collection of extensions of credit by extortionate means.
896. Effect on State laws.

1970 Amendment. Pub. L. 91-452, Title II, Section 223(b), Oct. 15, 1970, 84 Stat. 929, struck out item 895 "Immunity of witnesses".

§891. Definitions and rules of construction

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in

making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Added Pub. L. 90-321, Title II, §202(a), May 29, 1968, 82 Stat. 159.

18 U.S.C. 894

Section 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned no more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions

of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b) (1) or the circumstances described in section 892(b) (2) and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Added Pub. L. 90-321, Title II, §202(a), May 29, 1968, 82 Stat. 161.